

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

CONSERVATION LAW FOUNDATION, INC.)	
)	
Plaintiff,)	Case No.
)	
v.)	Proposed Consent Decree
)	
HARDING METALS, INC.)	
)	
Defendant.)	
)	

WHEREAS, Plaintiff Conservation Law Foundation, Inc. ("CLF") filed the above-captioned action against Defendant Harding Metals, Inc. ("Harding Metals"), alleging violations of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, and seeking declaratory and injunctive relief, civil penalties, and attorney's fees and costs;

WHEREAS, Harding Metals owns and operates a scrap metal recycling and sales site located at 42 Harding Drive, Northwood NH 03261 (the "Facility");

WHEREAS, CLF has alleged that the Facility discharges stormwater associated with its industrial activities to waters of the United States;

WHEREAS, Harding Metals has not applied for a stormwater discharge permit for the Facility;

WHEREAS, Harding Metals is unable to apply for a stormwater discharge permit for the Facility as the most recent National Pollutant Discharge Elimination System ("NPDES") Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity ("MSGP") issued by the Environmental Protection Agency ("EPA") has expired and a new MSGP has not yet been issued;

WHEREAS, CLF is a regional, nonprofit environmental organization;

WHEREAS, CLF has alleged in its complaint (the "Complaint") and in a letter (the "Notice Letter") dated November 12, 2014, sent to Harding Metals and others, that Harding Metals has violated and continues to violate Section 505 of the Federal Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1365(a); and

WHEREAS, Harding Metals denies the content of the Complaint but CLF and Harding Metals (collectively, "the Parties" or individually "Party") agree that resolution of this matter

without further litigation is in the best interest of the Parties and the public, and that entry of this Decree is the most appropriate means of resolving this action.

NOW, THEREFORE, without the trial of any issue of fact or law, without the admission by Harding Metals of any of the facts or violations alleged in the Complaint, upon consent of the Parties, and upon consideration of the mutual promises contained herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I. JURISDICTION AND VENUE

1. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question) and 33 U.S.C. § 1365(a) (Clean Water Act jurisdiction). The requested relief is proper under 28 U.S.C. § 2201, 28 U.S.C. § 2202 and 33 U.S.C. § 1365(a).

2. Venue is properly vested in this Court pursuant to 33 U.S.C. § 1365(c)(1), because the events giving rise to this action occurred at the Harding Metals facility, located at 42 Harding Drive, Northwood NH 03261, and in the Great Bay Watershed, which are located within this judicial district.

II. COMPLIANCE PROGRAM

3. Harding Metals will develop a written Stormwater Pollution Prevention Plan ("SWPPP") according to the requirements of the most recent MSGP by no later than January 30, 2015. The most recent MSGP as of the date of the Parties' signatures below is the 2008 MSGP, which expired on September 29, 2013. Harding Metals will update the SWPPP as necessary to comply with the 2013 MSGP when the 2013 MSGP becomes effective. The MSGP, as it may be updated from time to time, is incorporated into this Consent Decree by reference. Development of the SWPPP shall include, at minimum, the following steps:

- a. Formation of a pollution prevention team of qualified personnel who will be responsible for preparing the plan and assisting the plant manager in implementing practices to comply with the permit.
- b. Assessment of potential stormwater pollution sources.
- c. Selection of appropriate control measures that minimize the discharge of pollutants during storm events for each of these sources.
- d. Development of procedures for conducting required inspection and monitoring activities, as well as regular maintenance of control measures.

4. Harding Metals will hire a qualified engineering consultant to develop its SWPPP. Harding Metals will include the consultant's recommendations in its SWPPP.

5. Harding Metals shall provide a copy of its SWPPP to CLF for review and

comment by no later than February 9, 2015. CLF shall respond with comments within twenty-one (21) days of receipt. Within fourteen (14) days of receiving CLF's comments, if any, Harding Metals shall submit a final SWPPP to CLF, incorporating CLF's comments, or justifying in writing why any comment is not being incorporated.

6. Harding Metals will select, design, install, and implement control measures, in addition to existing control measures, in accordance with Part 2.1 of the MSGP, to meet numeric and non-numeric effluent limits and benchmark levels.

7. Harding Metals will design, install, and implement control measures, in addition to control measures that currently exist on the site, as deemed necessary by the SWPPP coordinator, that include, the following categories of site-specific best management practices ("BMPs"):

- a. Good housekeeping practices;
- b. Minimizing exposure of potential pollutant sources to precipitation;
- c. Erosion and sediment control; and
- d. Management of runoff.

8. Harding Metals will design, install, and implement control measures, in addition to control measures that currently exist on the site, as deemed necessary by the SWPPP coordinator, that include, but are not limited to:

- a. The site-specific BMPs listed in Part 8.N.3 of the 2008 MSGP (or the analogous section in later iterations of the MSGP), and
- b. The "BMPs for Potential Pollutant Sources at Scrap Recycling and Waste Recycling Facilities" listed in Table 2 of the EPA *Industrial Fact Sheet Series for Activities Covered by EPA's MSGP (Sector N: Scrap Recycling and Waste Recycling Facilities)*, available at:
http://water.epa.gov/polwaste/npdes/stormwater/upload/sector_n_scraprecycling.pdf

9. In addition to control measures that currently exist on the site, as deemed necessary by the SWPPP coordinator, wherever feasible, Harding Metals will design, install, and implement control measures that employ a low-impact development (LID) approach. LID is a natural-resource-based alternative approach to site design that incorporates a variety of structural and non-structural techniques, such as vegetated areas that collect, treat and infiltrate stormwater and shallow drainage channels that slow runoff and filter it.

10. Harding Metals will apply for coverage under the NPDES MSGP within thirty (30) days after the EPA reissues the MSGP, which was last issued in 2008 and expired as of September 29, 2013. Harding Metals will apply for coverage under the MSGP by submitting a complete and accurate Notice of Intent ("NOI") to the EPA and shall send a copy of the NOI to

CLF concurrently as it is provided to EPA. Harding Metals' NOI shall include a URL linking to the online electronic copy of the Facility's SWPPP.

III. MONITORING PROGRAM

11. Harding Metals agrees to sample its stormwater runoff for pollutants identified in the MSGP for Sector N (i.e., Chemical Oxygen Demand, Total Suspended Solids, Aluminum, Copper, Iron, Lead and Zinc) commencing after the date on which this Consent Decree is entered by the Court (the "Effective Date"). These inspections must be performed pursuant to the requirements of Part 4.1 of the MSGP and include, at a minimum, the stormwater collection (BMP) areas where runoff is generated, received, stored, treated, or disposed and that are exposed to either precipitation or stormwater runoff. Once Harding Metals has obtained coverage under the MSGP in the future as set forth in Paragraph 10, Harding Metals will commence submitting quarterly monitoring results to EPA pursuant to the requirements of the MSGP.

12. Harding Metals will also comply with all other inspection and monitoring requirements of the MSGP including, but not limited to, those of Part 4 including the in-house inspection of control structures and storage areas after rain events.

13. Harding Metals may take additional samples of its stormwater discharges. If it does so, Harding Metals will send a copy of each such inspection and/or sampling result to CLF no later than fourteen (14) days after receipt.

14. During the first year after the Effective Date of this Decree, Harding Metals shall implement control measures as necessary to meet the benchmark levels for the monitoring parameters Total Chemical Oxygen Demand, Total Suspended Solids, Aluminum, Copper, Iron, Lead and Zinc pursuant to MSGP Part 3.1. If, after the end of eighteen months from the Effective Date of this Decree, Harding Metals' quarterly monitoring results for any parameter exceed MSGP Part 8.N benchmark levels, Harding Metals agrees to pay stipulated additional Supplemental Environmental Project payments as set forth in Paragraph 18 of this Decree. Such stipulated additional Supplemental Environmental Project payments shall be calculated based on the number of monitoring parameters exceeded during a quarterly monitoring event, not on the number of discharge locations where a monitoring parameter is exceeded (i.e., an exceedance of the Copper monitoring parameter at three separate discharge locations sampled during one quarterly monitoring event shall result in one stipulated additional Supplemental Environmental Project payment, rather than three.

15. During the life of the Decree, CLF, through representatives, may conduct four (4) site inspections at the Facility. The site inspections shall occur during normal business hours and upon seven (7) days prior notice to Harding Metals. During the site inspection, CLF representatives may collect water and soil samples and take photos at the Facility. Any such samples shall be split samples with one of the split samples remaining in the possession of Harding Metals.

16. During the life of the Decree, Harding Metals shall copy CLF on all documents regarding the Facility submitted to the EPA. Such documents shall be provided to CLF

concurrently as they are sent to the EPA.

IV. SUPPLEMENTAL ENVIRONMENTAL PROJECT

17. Within 60 days of the Effective Date, Harding Metals shall make a payment to a Supplemental Environmental Project ("SEP") in the amount of twenty-five thousand dollars (\$25,000) to the New Hampshire Rivers Council for work to benefit water quality in the Great Bay Watershed. Harding Metals shall notify CLF in writing when the payment is made and provide a copy of the check.

18. For each exceedance of an MSGP benchmark as described in Paragraph 14 of the Decree, above, Harding Metals will make an additional SEP payment to the New Hampshire Rivers Council in the amount of Four hundred dollars (\$400.00) for work to benefit water quality in the Great Bay Watershed. Payment of each such additional amount shall be due fourteen (14) days following each exceedance. Provided, however, that no additional SEP payment shall be due for any exceedance of an MSGP benchmark revealed within the first eighteen (18) months following the Effective Date.

19. For each missed deadline included in this Decree, including but not limited to failures to timely conduct quarterly benchmark monitoring and inspections pursuant to Parts 4 and 6 of the MSGP, but not including missed payment deadlines (discussed in paragraph 22 below), Harding Metals will make an additional SEP payment to New Hampshire Rivers Council in the amount of five hundred dollars (\$500.00) for work to benefit water quality in the Great Bay Watershed. Payment of each such additional amount shall be due fourteen (14) days following each missed deadline. Harding Metals shall notify CLF in writing concurrently each time a payment is made and provide a copy of each check. Pursuant to Paragraph 42, below, Harding Metals shall not be required to make such additional SEP payment for missed deadlines arising from a Force Majeure event.

20. None of the SEP payments shall be disbursed to CLF.

V. LIQUIDATED ATTORNEY FEES AND COSTS

21. On or before May 29, 2015, Harding Metals shall pay to CLF a total sum of twenty-five thousand dollars (\$25,000) as full and complete satisfaction of CLF's claim for attorneys' fees and costs incurred to date in this matter and to help defray CLF's reasonably anticipated costs incurred in conducting compliance monitoring and case management during the term of this Decree.

22. In the event that any payment owed by Harding Metals under the Decree is not made on or before the due date, Harding Metals shall be deemed in default of its obligations under this Decree. In addition to a continued requirement to make said payment, Harding Metals shall pay to CLF liquidated attorney fees of one hundred dollars (\$100) for every day that a payment is late.

VI. EFFECT OF DECREE

23. CLF covenants not to sue and releases Harding Metals (and its parent corporations / entities, subsidiaries, officers, directors, shareholders, employees, agents, attorneys, consultants, successors and assigns) from any and all claims, causes of action, or liability under Section 505 of the Clean Water Act, 33 U.S.C. § 1365, for damages, penalties, fines, injunctive relief, or any other claim or relief (i) relating to or resulting from noncompliance with the Clean Water Act including without limitation, noncompliance with the MSGP at the Facility located at 42 Harding Drive, Northwood NH 03261 occurring prior to the date the Court enters this Decree or (ii) for any past violations alleged or that could have been alleged in the Complaint, and (iii) for any violations either alleged or which could have been alleged or referenced in the Notice Letter.

24. Harding Metals releases and discharges CLF, its representatives, assigns, agents, employees, officers, and attorneys, including those who have held positions in the past from any and all claims, liability, demands, penalties, costs, and causes of action of every nature which concern or are connected with this action.

25. Neither this Decree, nor terms thereof, nor performance of the terms thereunder by Harding Metals shall constitute or be construed as an admission or acknowledgment by Harding Metals of the factual or legal assertions contained in CLF's Complaint, and Harding Metals retains the right to controvert in any subsequent proceedings, other than proceedings for the purpose of implementing or enforcing this Decree, the validity of the facts or determinations contained in the Complaint. Neither this Decree, nor terms thereof, nor performance of the terms thereunder, shall constitute or be construed as an admission or acknowledgment by Harding Metals of any liability, or an admission of violation of any law, by Harding Metals or by its officers, directors, employees, agents, shareholder, attorneys, consultants, successors, or assigns.

26. CLF does not, by consent to the Decree, warrant or aver in any manner that Harding Metals' compliance with this Decree will constitute or result in compliance with federal or state law or regulation. Nothing in this Decree shall be construed to affect or limit in any way the obligation of Harding Metals to comply with all federal, state, and local laws and regulations.

VII. REVIEW AND TERM OF DECREE

27. The Parties recognize that, pursuant to 33 U.S.C. § 1365(c)(3), this Consent Decree cannot be entered until forty-five (45) days after the receipt of a copy of the proposed Consent Decree by the United States Attorney General and the EPA. Therefore, upon signing of this decree by the Parties, the parties shall jointly inform the Court of the decree and request to stay all deadlines, and CLF shall serve copies of this Decree upon the EPA Administrator, the Regional EPA Administrator, and the Attorney General for review, as required by 40 C.F.R. § 135.5.

28. Upon the expiration of the forty-five-day review period provided by 33 U.S.C. § 1365(c)(3), the Parties will jointly move the Court for entry of this Decree. This Decree shall take effect on the date it is entered by this Court and shall terminate upon the following: (1) three years have passed from the Effective Date; and (2) completion of all payment obligations set forth in this Decree. If for any reason the Court should decline to approve this Decree in the form

presented, the Parties agree to continue negotiations in good faith in an attempt to cure any objection raised by the Court to entry of this Decree.

VIII. MODIFICATION AND ENFORCEMENT OF DECREE

29. This Decree may be modified only upon written consent of the Parties and the approval of the Court.

30. This Court shall retain jurisdiction over this matter and allow this action to be reopened for the purpose of enabling the Parties to this Decree to apply to the Court for any further order that may be necessary to construe, carry out, enforce compliance and/or resolve any dispute regarding the terms or conditions of this Decree. If the Court does not agree to retain jurisdiction over this matter, then this Consent Decree will remain in full force and effect between the Parties, and any Party may institute a new action in the United States District Court for the District of New Hampshire concerning their respective rights and obligations under this Decree.

IX. MISCELLANEOUS PROVISIONS

31. This Decree shall remain in effect if Harding Metals relocates the Facility to a different location.

32. Sections I, IV, V, VI, VII, VIII and IX of this Decree shall remain in effect if Harding Metals ceases to be the operator of the Facility, regardless of whether the Facility continues to operate or not.

33. All payments pursuant to this Decree shall be made in form of a certified bank check.

34. Each person signing this Decree represents and warrants that s/he has been duly authorized to enter into this Decree by the Party on whose behalf it is indicated that the person is signing.

35. Entire Agreement. This Decree constitutes the entire agreement among the Parties concerning the subject matter hereof and supersedes all previous correspondence, communications, agreements and understandings, whether oral or written, among the Parties.

36. Notices. Any notice, demand, copies of documents and other communications required to be made under the provisions of this Decree (collectively, "Notices") by any Party hereto shall be effective only if in writing and (a) emailed, (b) personally served, (c) mailed by United States registered or certified mail, return receipt requested, postage prepaid, or (d) sent by a nationally recognized courier service (i.e., Federal Express) for next-day delivery, to be confirmed in writing by such courier. Notices shall be directed to the Parties at their respective addresses set forth below. Notices given in the foregoing manner shall be deemed given when (a) sent via email, (b) actually received or refused by the party to whom sent if delivered by courier, or (c) if mailed, on the day of actual delivery as shown by the addressee's registered or certified mail receipt or at the expiration of three (3) business days after the date of mailing, whichever first occurs.

Notices for Plaintiff shall be sent to:

Zachary K. Griefen, Esq.
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
zgriefen@clf.org

Notices for Harding Metals shall be sent to:

Earl L. Kalil, Jr.
Kalil & LaCount
681 Wallis Road
Rye, NH 03870
ryelaw@comcast.net

Each Party shall promptly notify the other Party of any change in the above-listed contact information by using the procedures set forth in this paragraph.

37. Successors and Assigns. This Decree shall be binding upon and inure to the benefit of the Parties and their respective representatives, heirs, executors, administrators, successors, officers, directors, agents, employees and permitted assigns.

38. Interpretation. The provisions contained herein shall not be construed in favor of or against any Party because that party or its counsel drafted this Decree, but shall be construed as if all Parties prepared this Decree, and any rules of construction to the contrary are hereby specifically waived. The terms of this Decree were negotiated at arm's length by the Parties hereto.

39. Headings. The section and paragraph headings contained in this Decree are for reference purposes only and shall not affect in any way the meaning or interpretation of this Decree.

40. Counterparts. Facsimile, electronic and scanned signatures shall be deemed to be originals for all purposes. Copies of the original Agreement, whether transmitted by facsimile or other means, shall be effective. This Agreement may be signed in counterparts.

41. Severability. In the event that any of the provisions of this Decree are held by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.


42. Force Majeure. For purposes of this Decree, a "Force Majeure event" is defined as any event arising from causes beyond the control of Harding Metals that delays or prevents the timely performance of any obligation under this Decree, except for obligations as provided in Paragraphs 18 and 22, notwithstanding Harding Metals' best efforts to avoid the delay. The deadline for the responsibility to perform any action under this Decree may be extended for up to

the number of days of nonperformance caused by the Force Majeure event, provided that Harding Metals complies with the notice requirements of this paragraph. Examples of events which may constitute Force Majeure events include severe weather events, natural disasters, and national, state or regional emergencies. Examples of events that are not Force Majeure events include, but are not limited to, normal inclement weather, unanticipated or increased costs or expenses of work, Harding Metals' financial difficulty in performing such work and acts or omissions attributable to Harding Metals' contractors or representatives.

If any event occurs which may delay or prevent the performance of any obligation under this Decree, caused by a Force Majeure event, Harding Metals shall notify CLF, at the address specified in Paragraph 36 above, within three (3) business days after Harding Metals first knows, or should know, that the event might cause a delay. This written notice to CLF shall include, without limitation: (i) an explanation of the causes of any actual or expected delay or noncompliance; (ii) the anticipated duration of delay; (iii) the measures taken and to be taken by Harding Metals to prevent or minimize the delay or nonperformance; (iv) a proposed schedule for the implementation of such measures; and (v) a statement as to whether in the opinion of Harding Metals the Facility can continue to operate in a manner which will not violate this Decree.

If CLF agrees that a delay or anticipated delay in performance is attributable to Force Majeure, the time for performance of the obligations under this Decree that are affected by the Force Majeure event shall be extended for the period of time reasonably necessary to allow performance of the obligation to the extent the delay was caused by a Force Majeure event. CLF shall not unreasonably withhold its approval or agreement.

CONSERVATION LAW FOUNDATION, INC.

By:  Date: 2/12/15

Christopher M. Kilian, VP and Director
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
(802) 223-5992 x4011
ckilian@clf.org

HARDING METALS, INC.

By: _____ Date: _____

Joseph J. Harding, Vice President
Harding Metals, Inc.
42 Harding Drive
Northwood, NH 03261
(603) 942-5573
joe@hardingmetals.com

ENTERED and DATED this ____ day of _____, 2015

Honorable
United States Chief District Judge

CONSERVATION LAW FOUNDATION, INC.

By: _____ Date: _____

Christopher M. Kilian, VP and Director
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
(802) 223-5992 x4011
ckilian@clf.org

HARDING METALS, INC.

By: _____ Date: 02-17-15


Joseph J. Harding, Vice President
Harding Metals, Inc.
42 Harding Drive
Northwood, NH 03261
(603) 942-5573
joe@hardingmetals.com

ENTERED and DATED this ____ day of _____, 2015

Honorable
United States Chief District Judge